"In the Glass Darkly": Legacies of Nazi and Fascist Law in Europe

By Mayo Moran[*]

Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions. Edited by Christian Joerges and Navraj Singh Ghaleigh with a prologue by Michael Stolleis and an epilogue by JHH Weiler. Hart Publishing, 2003. ISBN 1-84113-310-8. BP 55/$ 116.

A. Introduction[**]

The dust jacket of *Darker Legacies of Law in Europe* reproduces Georg Kolbe's 1945 sculpture "Liberated Man". The tragic figure provides a fitting opening to this volume of thought-provoking essays on the legacy of Nazi and Fascist law in Europe, and perhaps beyond. Kolbe's naked figure bent over in a posture of profound shame and disgrace transforms the triumphant implications of 'liberation' into a chilling irony. The essays gathered in *Darker Legacies* remind us of the continuing implications of the shadow of disgrace that accompanied the liberation of Europe from National Socialism and Fascism. However, Kolbe's figure also bespeaks the specific disgrace of the law in its willing service of brutal and totalitarian projects. Law, like man, was liberated to face its horrifying responsibility. *Darker Legacies* probes the nature of this responsibility, asking important questions about the meaning and endurance of law's complicity in evil.

The collection is rich in breadth and depth, with scholars from Europe and beyond tackling topics as diverse as fascist public and private law, the role of the legal profession and of adjudication in confronting evil law, the link between the European integration project and fascist re-conceptualizations of international law,

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and the complex heritage of modern human rights discourse. The scope of *Darker Legacies* is important, for it takes questions that have been primarily directed towards Nazi law and puts them into a broader European framework. As Joseph Weiler's epilogue rightly reminds us, this may threaten to elide significant differences. But with the integration of Europe, it nonetheless seems important to consider the ways in which the legacy of law during the period of National Socialism and Fascism continues to cast its shadow across Europe and perhaps beyond.

One of the contributions of this volume is to draw our attention to the legacy of fascism in European legal institutions beyond Nazi Germany. A nice illustration is found in Pier Giuseppe Monateri and Alessandro Somma's discussion of Nazi and Fascist theories of contract. These theories, the authors note, were united by a shared antipathy to the liberal political values expressed by traditional contract theory but divided because of the Roman law heritage of traditional theories of private law. The two regimes thus shared a commitment to the primacy of the individual's responsibility to the collectivity, a commitment they theorized and discussed. The Italians, however, were more reluctant to abandon their Roman heritage and implement fascist reconstructions of contract. Another helpful contribution to our understanding of the breadth of the fascist legacy is found in Luca Nogler's account of how Nazi conceptions of a 'new European order,' characterized in part by the treatment of labor, played out in Fascist Italy. As Nogler outlines, in the Italian context the much-discussed Nazi conceptions of labor and corporatism met with a complex reaction of both reception and resistance, not unlike the reaction that Monateri and Somma point to in contract law.

The volume also contains a number of pieces that remind us of the extent and complexity of the European fascist debates about public and constitutional law. Given Carl Schmitt's prominence as the pre-eminent legal theorist of Nazism, it is unsurprising that consideration of his work forms a major theme in this volume. But before discussing what this volume contributes on that point, it is worth noting that *Darker Legacies* reveals not only Schmitt's dominance as a theoretician but also the extent to which consideration of and debate with Schmitt was critical to the fascist understanding of public law in Italy, Spain, and Austria as well. An example is found in Massimo La Torre's insightful discussion of Constantino Mortati's conception of the 'material constitution' and the extent to which he drew on and was critical of Schmitt's account. In Augustin José Menédez's account of the growth of fascist ideology in Spain, too, we see the influence of Schmitt, particularly of Schmitt's interpretation of the early Spanish anti-liberal José Donoso Cortés. The consequence, Menédez notes, was a powerful political conception of Catholicism. The role of anti-liberal political Catholicism, also indebted at least in part to Schmitt, is also stressed in Alexander Somek's account of Austria's development of

a conception of authoritarian constitutionalism. Thus we see the extent to which the discussions of the anti-liberal state and constitution were European ones and were characterized both by significant continuities (Schmitt and the role of political Catholicism stand out here) and by significant national diversity. But the authors also draw our attention to the fact that outside Germany, this legacy has received little attention. As Menédez puts it, the "forgetful character of the Spanish transition to democracy" blunted sensitivity to the troubling continuities with the past.[1] By drawing out the nature of the interconnections, then, these pieces do important work in making visible the more shadowy parts of the dark legacy.

Making visible the unacknowledged parts of one's own shadowy legacy, as the authors discussed above do, is perhaps the least fraught – though certainly not the least important – task of this volume. But much of *Darker Legacies* is taken up with more charted and more difficult terrain. And this terrain, which focuses on how to understand the legacy of Nazi law, is not particularly hospitable to the scholar and interpreter. We tend to assume that the many forms of legal injustice under the Nazis are relatively well documented. This is, of course, not entirely true, and several pieces in this volume - including Michael Stolleis' prologue and Ingo Hueck's piece on Reinhard Höhn - remind us that our knowledge may well be limited and partial. Indeed, Stolleis notes how the general complicity of the legal profession under Nazism belies the dominant post-war image of the 'suffering judiciary' and the profession more generally as a victim, not a perpetrator, of Nazi horror. And he traces this 'reluctance to glance in the mirror' far beyond the end of the war years. What is ultimately surprising, for Stolleis, is not the existence of the "cartel of silence" but the fact that it lasted well into the 1960s.[2]

But while legalized Nazi injustice has already been well explored and national self-deceptions unmasked, subsequent writers and scholars find themselves in a more difficult position. Twin dangers seem to beset those who venture into a detailed analysis of profoundly evil institutions like many of those represented in this book. The analysis of the role of law in brutal and fascist regimes yields so automatically to an unequivocal condemnation that it appears to confine the scholar to a role that is in some sense too simple. But while it may therefore seem problematic to study Nazi law simply to confirm its invidiousness, it seems at least as inapt to approach the task in a more open-minded way. More deeply, these unpalatable extremes

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[1] Augustìn José Menéndez, *From Republicanism to Fascist Ideology under the Early Franquismo*, in DARKER LEGACIES OF LAW IN EUROPE, 337, 360 (CHRISTIAN JOERGES/NAVRAJ SINGH GALEIGH EDS., 2003).

[2] Michael Stolleis, *Prologue: Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945*, in DARKER LEGACIES OF LAW IN EUROPE, 1, 16 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003).

speak to how to understand the relation between us and them. Though the 'prosecutorial' stance does not inevitably imply moral infallibility, the danger of infusing justifiable condemnation with a sense of our own superiority is one temptation that that stance holds out. There is no easy response available here, however, for less judgmental readings, especially those that emphasize the continuities between 'us' and 'them', often threaten to collapse crucial differences to the vanishing point, and this too seems too simple. Many of the materials in this volume struggle with these questions explicitly or implicitly, and if few are fully successful, that speaks more to the difficulty of the task than to the deficiencies of these works.

The inherent difficulty and unease of a project like this is present in almost every piece that deals with the Nazi legacy. The preface discusses the 'sensitivity' of the project, and the book ends with Weiler's epilogue, which explores the dangers of an instrumentalist reading of this history. These dangers are most threatening when scholars stray away from the straightforwardly condemnatory position. Thus, as many of the pieces in this collection seriously consider and debate the works of Carl Schmitt, almost all express some unease or need to justify their attention. Those writers who seek to trace the relationship between Nazi law and ideology and legal debates beyond the confines of fascism undertake a yet more delicate task, as we see in the work of Lawrence Lustgarten and David Fraser. But perhaps the most challenging question underlying this volume is whether the darker legacy is to be studied for anything beyond what Neil Walker aptly terms its 'dystopian' value. For while the negative value of this legacy seems relatively clear, some of the authors here also ask whether Nazi conceptions now hold any positive value for our understanding of Europe, legal liberalism, or even - most controversially - human rights discourse. Is there something, they wonder, in this deeper (though certainly also narrower) sense of community that might be rescued to enrich the apparent 'thinness' of post-liberal conceptions of belonging? Ultimately, while we may admire the boldness of even voicing this question, there is little in the volume to persuade the reader that the dark legacy is other than dystopian. This, of course, is not incompatible with the fact that Nazism and Fascism may well have made invidious use of ideals in which enduring value may yet be located. The possibility of resurrecting ideals of demos, even ethnos, and nationalism from the grip of the fascist imagination thus forms an important theme of this book. Recognizing that the legacy of law under fascism is profoundly dystopian also reveals how critical it is that we fully grasp the teaching of these painful lessons and try to understand the sources and the troubling appeal of Europe's dark years. This collection contributes in an important way to that elusive task.

B. Sources and Legacies: Schmitt and Europe, then and now

If one needed testimony to the intellectual dominance of Carl Schmitt in theorizing the ambitions of the fascist legal order, within and beyond the borders of the state, *Darker Legacies* undoubtedly provides it. As noted above, several articles in this collection reveal the extent to which Schmitt's ideas 'migrated' (in contemporary constitutional parlance) to fascist Europe more generally, serving as a focal point for national critiques of liberalism, the state, and the international order. But unsurprisingly, given that the collection concerns the significance of the dark legacy for Europe, perhaps its most important theme is found in the exchanges that consider the sources and meaning of that legacy for the European integration project in particular. Unified Europe is commonly understood as the definitive repudiation of Nazis ideals. But this volume queries that characterization, asking to what extent Europe may in fact be the realization of the Nazi project. Is Schmitt the architect of Europe, and, if the EU bears his imprint, what is the significance of that revelation? These and like questions form the core of *Darker Legacies*.

One issue that preoccupies many commentators is the völkisch (national) question, or, more broadly, the question of what kind of homogeneity democratic community demands. As many readers will be aware, one reason for the contemporary salience of this debate is found in the German Constitutional Court's Brunner decision on the Treaty on European Union.[3] In that controversial decision, the Constitutional Court held that the European Union was not a federal entity into which the German Federal Republic could legally be integrated under the terms of the Maastricht Treaty. In the Court's view, the necessary preconditions for democracy were absent because no democratic policy could be said to exist. A democratic polity required an observable demos brought into being by an empirically observable people. For the Court, the simple amalgamation of European peoples did not create a people because that would require a relatively homogeneous population.

The Brunner decision has already been the subject of significant criticism, most notably by Joseph Weiler, who tackles the troubling implications and Schmittian undertones of the German Constitutional Court's 'no demos' thesis.[4] But Weiler's epilogue to *Darker Legacies* also insists that, freed of Schmittian associations, ideas of demos and nationalism or belonging may have some enduring importance in a post-nationalist Europe. A number of the contributions to this volume take up this debate.

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[3] *Brunner v. European Union Treaty*, 75 COMMON MARKET LAW REVIEW (1994).

[4] Joseph Weiler, *Does Europe Need a Constitution?: Demos, Telos and the German Maastricht Decision,* 1 EUROPEAN LAW JOURNAL 219 (1995).

One theme concerns whether it is indeed correct to identify Schmitt as the author of the ethnically based understanding of homogeneity that Weiler and others associate with Brunner's 'no demos' thesis. Navraj Singh Ghaleigh takes issue with the attribution of the racist conception of the demos to Schmitt. In fact, Ghaleigh argues, while there are undoubtedly many reasons to criticize Schmitt, a closer look at Schmitt's texts suggests that he articulated a more heterogeneous conception of the demos. This conception of belonging, based on a commitment to a shared future and shared values and aspirations, may well be read as contributing something to our understanding of democratic polity.

While Ghaleigh simply points away from Schmitt as the author of the racist conception of the demos, Ingo Hueck identifies the more likely culprit - Reinhold Höhn. Höhn was another prominent Nazi jurist and a bitter rival of Schmitt's. Schmitt was an outsider and a brilliant lawyer and theoretician, while Höhn was an ambitious career Nazi whose skills were primarily political and rhetorical. According to Hueck's account, it was Höhn who appropriated Schmitt's idea of Großraum (sphere of influence) and infused it with a racist interpretation of master and slave peoples. Yet, ironically, while a disgraced Schmitt returned to his birthplace after the war and never really re-entered public life, Höhn made an extremely successful re-entry after a brief absence. He established a management school that employed former SS colleagues and trained the new country's future leaders. Hueck notes that when Höhn died in 2000, obituaries in the leading newspapers praised his managerial career and made no mention of his leading role as an ideologue for Nazi expulsion and extermination policies.

Other commentators are less concerned with attribution and more concerned with the continued salience of the Nazi imperialist model for Europe. The most pressing question for many in this collection is whether the project of integrating Europe is in some way premised on a conception of belonging that finds its roots in the imperialist and homogenizing Nazi doctrine of Großraum or sphere of influence, first articulated by Schmitt and developed by others, including Höhn. The similarity of the Großraum to the EU is such that it raises special questions about the roots of the integration project. And, as noted above, the Brunner decision only heightened concerns that the EU may find its roots in older and troubling conceptions of belonging. Thus, the commentators here who consider the problem of how to understand Europe and belonging in light of the Nazi legacy seem to search for a kind of midpoint between the troublingly homogenizing implications of the Brunner decision and the spiritual vacuousness of a fully post-nationalist conception of belonging.

An example is found in J. Peter Burgess's suggestion that there is indeed a European ethnos, albeit one that tends to manifest itself negatively in political conflicts on issues like immigration, religious freedom, minority rights, language policy, and educational policy. But understanding ethnicity as essentially constituted through contention and renewal suggests, for Burgess, a reframing of the contemporary question about Europe. A form of polity, he suggests, may be located in shared resistance to that homogenizing idea. As Jürgen Habermas identifies the overcoming of nationalism as the unifying principle and cautionary tale of the new Europe[5], Burgess suggests that the troubling implications of ethnos can be reframed as the very resistance to homogenization. This, in turn, can form the basis of a polity that rejects the orthodox understanding of that concept.

But John P. McCormick points out in his contribution that while this approach may respond to the question of Europe's commonality in distinctively un- (indeed, one might say anti-) Schmittian terms, it is not similarly responsive to the question of Europe's specificity. McCormick does find in the EU important traces of Schmitt's Catholicism and of his technocratic commitments. However, because of its connections East and West and because of its fundamental commitment to the equality of member states, the EU is also importantly different from the Schmittian conception. But even if we can identify a post-nationalist commonality, McCormick asks, what is it that delineates Europe from the rest of the world? In the absence of meaningful and democratic structures of governance McCormick, at least, discerns a worry about the endurance of Nazi conceptions of ethnic superiority and enforced homogeneity that characterized the earlier Schmittian vision of integration.

For others, too, the strictly post-nationalist conception of belonging is at best an incomplete understanding of what constitutes Europe. In his epilogue, Weiler notes how McCormick rightly points to a nagging question about the commonality and specificity of Europe. Like Burgess, McCormick, Ghaleigh, and others in this volume, Weiler discerns in the dark legacy a particularly invidious loss: the loss of the ability to access and develop conceptions of nationalism and patriotism in specifically liberal ways. The potential value of nationalism as an expression of loyalty, responsibility, and social solidarity that simultaneously tolerates and transcends multicultural diversity is, he argues, simply too valuable to be ceded to retrograde nationalists like Jean-Marie Le Pen and Jörg Haider.

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[5] John P McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, in DARKER LEGACIES OF LAW IN EUROPE, 133, 141 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003), quoting Jurgen Habermas, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY (C. CRONIN & P. DE GREIFF EDS., 1998); Jurgen Habermas, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS, (MAX PENSKY ED., 2001).

But what exactly is the content of this liberal nationalism? For many contributors to *Darker Legacies*, it must be more than the simple transcending of nationalism or ethnicity - it must speak, in a sense, to the heart and not simply the head. Burgess, for instance, congratulates Weiler on his unwillingness to abandon these old ideals, though one may well wonder whether Burgess's own reconfiguration of ethnos as a shared resistance to homogenization does not retain the language but give up the idea. Perhaps, though, the conception of ethnos that Burgess tries to work with is simply too resistant to his ambitions. Ghaleigh's effort takes hold at a more abstract level, asking not about ethnos but about whether there is any form of homogenization that might rightly be understood to be implicit in any meaningful concept of belonging. He suggests that a more robust and positive conception of belonging, which draws on Pettit's idea of commitment to common interest,[6] may actually be an unlikely legacy of Schmitt for Europe. Weiler, too, invokes the contribution of the 'dark years,' here in the form of the language of destiny and fate, to express an idea that cuts against the old meaning of such rhetoric. For the community of fate here is characterized by its commitment to those institutions - such as the rule of law, democracy, and human rights - that were built up after the dark years, largely in response to the legacy of fascism. The extent to which such conceptions do and, more troublingly perhaps, ought to speak to the heart and resonate with older conceptions of belonging is, unsurprisingly, still an open question. But then again, the emergence of an integrated and perhaps constitutionalized Europe is very much a work in progress, and we might rightly expect that the same will be the case with liberal nationalism more generally.

The Schmittian heritage of the idea of Europe also provokes other contributions to this volume. Christian Joerges, for instance, pursues the question of what threads of continuity might exist between Schmitt and contemporary Europe on the question of the internal ordering of the Großraum. What Joerges notes here is the paucity of the internal account of the Großraum. This is hardly surprising, given the nature of Nazi theory of the state. For, as Oliver Lepsius' discussion of Nazi constitutional theory suggests, the radical reconfiguration of all of the key structures of the state in the Nazi political imagination makes it difficult to describe that understanding as a constitutional theory. This, of course, as both Lepsius and Joerges remind us, is entirely in keeping with National Socialist ambitions, which envisaged a radical rupture with both traditional international law and liberal-legal conceptions of the state. And there were other reasons to resist replacing the traditional internal structures with new ones.

[6]Phillip Pettit, A THEORY OF FREEDOM: FROM THE PSYCHOLOGY TO THE POLITICS OF AGENCY (2001).

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Despite the paucity of the theory of the state, Joerges notes, Schmitt's 'gloomy vision of a "strong state" and a "healthy economy"[7] continued to exert its pull on the post-war understanding of supranationalism, and European supranationalism in particular. This is evident, for Joerges, in the way that both of the dominant post-war conceptions of supranationalism promised answers to the European legitimation dilemma that rested on the healthy economy/strong state idea rather than on national democratic affirmation. And though these strands of 'continuity with the pre-democratic' German heritage are striking, we ought not to take this to mean that they are also limiting. The most resounding counter to this heritage is presumably that, in strikingly anti-Schmittian fashion, the growth of Europe has actually generated the need for a legitimating constitution, albeit one that must inevitably depart from inherited national alternatives. For Joerges, this task is squarely in the terrain of political imagination, not history.

Nonetheless, recognizing the Nazi heritage of some of the problems that Joerges rightly identifies as common to the Großraum and the EU may actually sharpen our sense about what it is that is at stake in contemporary EU governance debates. Thus, as Walker argues, though problems such as the management of the economy, the tension between political choice and technical expertise, and the difficulty of achieving accountable and transparent administration are not unique to multi-level polities like the EU, they are certainly exacerbated by such structures. And behind these problems lies the core difficulty of modern politics: how to reconcile the "three virtues of economic well-being, social cohesion and political freedom".[8] The Nazi solution insisted on the primacy of politics, even though, as Walker suggests, this turned out to undermine the value of politics itself. But the negative lesson is, as usual, easier to draw than the positive one. So if, as Walker notes, we can be confident about where the Nazi solution went wrong and can thereby insist on an equal focus on all the core values, this does not simplify the task of determining how they ought properly to be balanced in any particular case. And for Walker, as for Joerges, examining the successes and the failures of history will be important in determining when and how far the inherited structures of national constitutionalism will be helpful.

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[7] Christian Joerges, *Europe as Großraum? Shifting Legal Conceptualizations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE, 167, 187 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003).

[8] Neil Walker, *From Großraum to Condominium – A Comment*, in DARKER LEGACIES OF LAW IN EUROPE, 193, 200 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003).

C. Lessons for Europe and Beyond

Given the nature of this collection and its timing, it is unsurprising that the significance of the dark legacy for the future of European integration is one of the dominant themes. However, there is also much in the volume that speaks to those not specifically focused on Europe. The debates about multiculturalism, nationalism, and belonging discussed above are an obvious point of commonality between questions that preoccupy Canadian identity and those that currently preoccupy Europeans. (Indeed, in light of the richness and sophistication of the Canadian debate on these very issues, it is somewhat surprising to find so little awareness of it here.) There are also, however, more obvious and more explicit connections to legacies beyond those of Europe in particular. Some sense of the breadth of the collection may therefore be conveyed by briefly exploring a few of these more explicit connections.

One of the dangers of too near a focus on the evil of the dark years, as I noted in the introduction to this review, is that as it inculpates some, it may also seem to exculpate others. The very fact of focusing on the darker legacy of law in Europe, particularly in fascist Europe, may thus seem to convey a troubling message about whose law has a legacy that must be contended with and whose does not. Though the epilogue to *Darker Legacies* decries, and rightly, the dangers of an instrumentalist use of such a period, the dangers of overlooking parallels where they are relevant are perhaps no less worrisome. This is particularly so as World War II allies such as Canada and the United States face increasing scrutiny of their own legal pasts. The temptation, in such moments, to insist that the burden of accounting belongs to others may be especially powerful. Indeed, in a recent decision the Ontario Court of Appeal ruled that there could be no recovery for a racist head tax levied against Chinese immigrants in the early decades of the twentieth century.[9] The court explicitly denounced the discriminatory and unjust nature of the law at issue; however, it did not follow the lead of post-war German cases that refused to give juristic force to evil laws. In response to those arguments, the court noted that the racist legislation was enacted not by a 'totalitarian government' but by a democracy.[10] The Head Tax law at issue in that case, explicitly and blatantly racist though it was, was certainly not Decree 11, the infamous Nazi

[9] *Mack v. Canada A.G.* 6 O.R. (3d) 2002, 737 (Ont. C.A.)

[10] This invocation of democracy was despite the evidence before the Court of Appeal that the franchise at the time of the relevant laws was severely restricted on race and gender lines and, in particular, excluded Chinese-Canadian citizens from the right to vote. Appellant's Factum, Ontario Court of Appeal, at para. 108-9, citing Minister of Public Works and Government Services Canada, HISTORY OF THE VOTE, and *Cummingham v. Tomey Homma* A.C. 1903, 151 (P.C.), available at http://www.utoronto.ca/documents/conferences/reparations_mack-appellantsfactum.pdf.

decree that abrogated the citizenship of Jews who had left Germany and expropriated their property. Nonetheless, there is something rather too quick in the court's use of the acknowledged evil of other regimes to deflect attention from an examination of the injustices of our own. After all, it is hardly newsworthy that even generally just regimes have legal pasts characterized by profound legalized injustice. What seems rather more unsettling is the idea that 'just' regimes have any duty to account, to make amends, of the kind commonly assumed to be desirable in the case of regimes with evil pasts. In light of this asymmetry, it seems particularly important to ensure that the entirely justified condemnation of some does not imply the exoneration of others. But the task itself poses difficult questions about how to understand the connections and disjunctures.

In his contribution to *Darker Legacies*, Laurence Lustgarten directly considers this question, suggesting that rather than an alien "them", those who perpetrate moral horror might be more illuminatingly thought of as "a distorted image of ourselves".[11] And if there is a continuum rather than a chasm between them and us, then that may raise difficult questions about the actual differences between elements of Nazism and the practices of 'liberal' societies. Because threats to public safety or order place the greatest strain on the values of liberal democracy, the treatment of issues like crime, social control, and disorder seems to form the area of greatest commonality between Nazism and liberalism. A number of his examples, eugenics in particular, have already been the subject of extensive comment on the question of their relation to Nazi policies. So what Lustgarten usefully does here is not so much to draw the examples themselves to our attention, but to trace the similarity of the justification and the rhetoric involved. Though it is not always clear that his contemporary analogues can bear the weight his argument puts on them, the larger value of his piece lies elsewhere. By tracing the common willingness to abandon fundamental rights and freedoms in the face of vague reasons of 'public morals' and threats to public security, he points to a worrying weakness in our commitments to liberalism. This is also the larger point of which Ghaleigh reminds us in his discussion of the use of emergency powers in a post-September 11 world. And the fact that it is all too easy to manipulate our collective credulity in such moments is a worry that does resonate with Nazi Germany's far more profound violations of human ideals.

David Fraser's excellent essay on the treatment of Nazi law in contemporaneous Anglo-American jurisprudence raises similar problems but strikes rather closer to home. In fact, it can be seen as the Anglo-American counterpart to Stolleis' account

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[11] Laurence Lustgarten, *'A Distorted Image of Ourselves': Nazism, 'Liberal' Societies and the Qualities of Difference*, in DARKER LEGACIES OF LAW IN EUROPE, 113, 113 (CHRISTIAN JOERGES, NAVRAJ SINGH GHALEIGH EDS., 2003).

of the legal profession in Germany, since both authors reveal how the legal profession betrayed its own highest ideals. In Fraser's case, this involves examining how Anglo-American legal scholars understood Nazi law during the period of its promulgation. Did they see it as 'not law,' as radically discontinuous with what they took the legal project to be? Though this 'discontinuity thesis' is now an orthodox reading of Nazi law, Fraser's insightful reconstruction calls its venerability into question. In fact, the writings of Anglo-American legal scholars at the time actually tell against the discontinuity thesis by revealing the extent of continuity between the rules and discourse of post-1933 Germany and that of the English-speaking world during the same period. Thus Fraser traces how leading Anglo-American scholars treated issues now thought of as paradigmatic examples of Nazi corruption of the legal form, such as Nazi citizenship laws, the recourse to emergency powers, the removal of non-Aryans from the civil service, the process of exclusion of Jews, eugenics, and criminal law 'reforms.' The most chilling aspect of Fraser's archival work here is the 'matter-of-factness' of many contemporaneous Anglo-American accounts of Nazi law. Tellingly, for most Anglo-American commentators on Nazi law at the time, the question of whether or not it was 'law' did not even seem to arise; instead, Hitler's regime was largely understood as more or less normal. Similarly unsettling to the modern reader is the explicit invocation of a by now familiar form of relativism, the hesitation to judge that which we do not fully know. Fraser's account rightly reminds us that among its many tasks, the discontinuity thesis has served to distinguish between those legal traditions that need to face up to their legal pasts and those that do not. Yet the fact that much Nazi law was seen, at the time, as simply normal points to the shared nature of at least some elements of the 'dark legacy.' The extent to which the injustice of the Nazi regime was invisible because of its similarity to contemporaneous Anglo-American legal practices and theories that scholars themselves noted reveals a more general failure of the most scholarly of virtues – self-criticism. Now that the Anglo-American legal academy has acknowledged the failure of Nazi law to live up to the legal form, perhaps it is time, as Fraser's argument suggests, to bring that difficult lesson home and to face the demons of our own past.

As Fraser's piece points out, the complicity of law in regimes like that of National Socialism in particular raises questions about the self-understanding and meaning of law itself. It also implicates problems of legal theory that go back at least to the Hart-Fuller debate and that have become more pressing with the contemporary wave of constitutionalization and the concomitant increase in judicial review. What lessons can the existence and adjudication of evil law contribute to the ongoing debate over the appropriate role of the judge and the implications of that role for legal theory more generally? Curran and Matthias Mahlmann consider the implications of the darker legacy for the ongoing debate about positivism/formalism and anti-formalism. Vivian Curran takes up the question

that was at the heart of the Hart-Fuller debate: To what extent did the positivistic understanding of the judicial role contribute to the injustice perpetrated through the Nazi legal system? The orthodox post-war view, Curran notes, holds that positivism did play a role. But Curran challenges this by contrasting German and French courts during the fascist period. This contrast is illuminating, Curran suggests, because the French courts adopted a more formalist stance while the German courts enjoyed more interpretive freedom. Despite this difference in judicial methodology, however, Curran argues that the "judicial injustice in the two countries was comparable".[12] From this she concludes that judicial methodology is "correlated weakly' with judicial injustice".[13] The real culprit lies elsewhere - it is found in the fact that the relevant orders were anti-pluralist, permeated by what Curran calls 'unicity.' Thus, focusing on the seductive power and the danger of a unifying vision may actually hold more important lessons for the future of Europe, and its relation to its fascist past, than the question of the relation between judicial methodology and legal injustice.

Matthias Mahlmann takes up various aspects of Curran's argument. Usefully, he tackles one version of the normative work done by the condemnation of positivism, noting the view that that "positivism made German lawyers defenseless against the onslaught of Nazi law."[14] So one troubling implication of the thesis may be to shift blame from the judges to their methodology - the legal profession, and perhaps even the legal system more generally, are, on this view, victims of positivism. But this is belied, Mahlmann notes, by the judicial activism in cases such as 'mixed marriages.' In fact, cases such as these suggest that judges were, to some significant degree, the authors of legal injustice, not its victims. Thus, he concurs with Curran that ideology, not methodology, is doing the real work here. Yet Mahlmann's own proposal betrays ambivalence about Curran's thesis on the irrelevance of methodology. In fact, he suggests that positivism might actually have prevented some of the early excesses of Nazi law. On his view, then, moderate pragmatic positivism is desirable for a democracy because it increases the binding power of legal norms and thus the power of the people to translate majority will into law. Taking this view back to the example of Nazi law thus suggests, contra Curran, that methodology does matter. Indeed, the reason that positivism appeals to Mahlmann is that he believes it would have restrained the judiciary from its own invidious

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[12] Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, in DARKER LEGACIES OF LAW IN EUROPE, 205, 205 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003).

[13] Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, in DARKER LEGACIES OF LAW IN EUROPE, 205, 205 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003).

[14] Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in DARKER LEGACIES OF LAW IN EUROPE, 229, 232 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003).

'innovations,' which outstripped, for a while at least, even the pronouncements of the Nazi state. It is worth noting, however, that this point sits a bit oddly with the traditional debate, which focuses on the position of the just judge faced with the application of evil law. Mahlmann's point, and perhaps Curran's as well, may therefore speak more to the question of who populates the judiciary than to the significance of methodology per se. Where Mahlmann is explicit about his difference with Curran is on the attachment to pluralism. Thus, he rightly notes the moral neutrality of pluralism and reminds us that it can provide a suitable basis for a social and legal order only if it is understood on a "firm universalistic basis, in modern times in essential parts codified in human rights."[15]

D. Beyond Dystopia?

A difficult question that runs through many of the pieces in this collection concerns the extent to which the dark legacy may be useful beyond its obvious dystopian value. As we have seen, one version of this question raised here concerns the continued viability of conceptions of ethnos or demos and robust conceptions of nationalism. Even here, though, the lessons of the fascist period are primarily negative, for, to the extent that such ideals are resurrected, the very value of any such resurrection rests on its divergence from the Nazi conception. But James Whitman's piece tracing the contemporary idea of dignity back to roots that are found, in part, in distinctive Nazi initiatives is a more complex rendering of the lessons of history. Whitman notes that the standard reading is that primacy of dignity in the post-war legal order was a reaction against the fundamental violations of dignity that characterized the Nazi era. But he argues that the history is more complex and that the contemporary conception of dignity in fact owes a substantial debt to the Nazi period. The history of human dignity is at least in part a history of 'leveling up' - that is, extending the benefits of elevated social status to all. Importantly for Whitman's argument, this leveling up also characterized the Nazi period in a particular way. Thus, he traces how Nazi concepts of honor, once reserved only for high-status individuals, were gradually extended to low-status persons. This had significant implications for labor relations, on Whitman's reading, because the courts of social honor established by the Nazis were often used by vulnerable workers, such as women and apprentices, and thus "heralded a real attack on traditional hierarchical norms in the workplace."[16] This attack was

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[15] Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in DARKER LEGACIES OF LAW IN EUROPE, 229, 232 (CHRISTIAN JOERGES/NAVRAJ SINGH GHALEIGH EDS., 2003).

[16] James Q Whitman, *On Nazi 'Honour' and the New European 'Dignity'*, in DARKER LEGACIES OF LAW IN EUROPE 243, 258 (CHRISTIAN JOERGES/NAVRAJ SINGH GALEIGH EDS., 2003).

accompanied by more well-known Nazi labor innovations that aimed to elevate the status of blue-collar workers in particular. For Whitman, this systematic effort on the part of the Nazis to 'level up' low-status workers to the privileges of high-status honor is part of the long history of German dignity that began well before the Nazi era and continued after it. So with respect to certain aspects of dignity, he suggests that the Nazi era is most plausibly understood as continuous with what preceded and followed it. In part this is because the promise of dignity – of being better than someone else – was "thoroughly compatible with the worst horrors of the Nazi order."[17] Recognizing the Nazi legacy of dignity may also force awareness of the darker truths of the human psyche, in particular that our sense of value too often derives from identifying someone of lesser value or status. Whitman does acknowledge that anti-Nazi conceptions of dignity take hold at the moment when dignity is extended to those who do not possess the claim to membership on which Nazi dignity was premised. But what he finds the hardest question is revealing. The question is not whether Nazi history is consistent with the contemporary drive of dignity to 'level up' those without social status, for it is. Rather, the underlying and essentially hierarchical conception of dignity that Whitman's account depends upon is apparent in the fact that, for him, the hard question is whether "it is really going to be possible to maintain everybody at the top of the social scale".[18]

Gerald Neuman's comment does not explicitly critique this idea that dignity is premised on exclusion and privilege. But he does strike at its foundation and, implicitly, also at the idea that Nazi dignity contributed positively to the contemporary ideal by drawing our attention to the important distinction between dignity and human dignity. So while the history of dignity may be premised upon a 'leveling up' of historically differential forms of dignity, the whole premise of human dignity is that it is "intrinsic to humanity, that it is shared by every individual human being."[19] And although there may be continuity between these conceptions, it would be "shocking" to discover "a genuine moral insight that the Nazis were the first to perceive and act upon, and that has become part of the modern law of human dignity".[20] More likely sources of human dignity may instead be found in post-war 'constitutive international acts.' Thus Neuman notes

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[17] James Q Whitman, *On Nazi 'Honour' and the New European 'Dignity'*, in DARKER LEGACIES OF LAW IN EUROPE, 265 (CHRISTIAN JOERGES/NAVRAJ SINGH GALEIGH EDS., 2003).

[18] James Q Whitman, *On Nazi 'Honour' and the New European 'Dignity'*, in DARKER LEGACIES OF LAW IN EUROPE, 266 (CHRISTIAN JOERGES/NAVRAJ SINGH GALEIGH EDS., 2003).

[19] Gerald L. Neuman, *On Fascist Honour and Human Dignity: A Sceptical Response*, in DARKER LEGACIES OF LAW IN EUROPE, 267, (CHRISTIAN JOERGES/NAVRAJ SINGH GALEIGH EDS., 2003).

[20] Gerald L. Neuman, *On Fascist Honour and Human Dignity: A Sceptical Response*, in DARKER LEGACIES OF LAW IN EUROPE, 268 (CHRISTIAN JOERGES/NAVRAJ SINGH GALEIGH EDS., 2003).

the prominence of human dignity in the Preamble to the United Nations Charter and in the Universal Declaration of Human Rights. As he puts it, the positive contribution of Nazi honor to the international conception of human dignity in these documents "was nil".[21] Thus, for Neuman, the evidence supports rather than undermines the thesis that the lessons of the Nazi conception of dignity were fundamentally negative in character; indeed, the causative links go from the international community to Germany rather than the other way around. Neuman also suggests that the evidence concerning the treatment of workers is rather mixed and that many Nazi 'innovations' actually have more complex roots, often in the Weimar trade union movement or in international labor goals. Ultimately, Neuman is skeptical about the view that old conceptions of honor have much to teach us about the difficult questions of human dignity in modern constitutional regimes.

E. Conclusion

Darker Legacies is an important contribution to a growing field. Ironically, recent developments both in Europe and beyond have perhaps made facing the implications of that legacy even more pressing now than it was in decades past. The most obvious reason for this is found in the constellation of questions concerning the foundations and implications of European integration. By facing and examining the range of meanings that the dark years might hold for the future of Europe, this volume makes important contributions to a debate that is significant for Europe and beyond. The legacy of the dark years for conceptions of belonging, for the meaning of a shared destiny, extends far beyond the borders of what was once fascist Europe and haunts all who seek to articulate a non-coercive conception of membership. But Europe holds a special place in our imaginations as we embark on such projects, for Europe is both the site of terrible abuses of human rights in the name of nationalism and the harbinger of a complex post-nationalist conception of belonging. As we also see in *Darker Legacies* the lessons of Europe under fascism also go further, forcing difficult questions about the depth and tenacity of legalized injustice even in notionally just regimes. *Darker Legacies* even goes so far as to ask whether, paradoxically, there might be any non-dystopian value to be found in Europe's dark years. It is admirable that this collection even considers that question and that it takes the possibility seriously, but ultimately - and perhaps unsurprisingly - it simply does not seem possible to retrieve such a lesson from this period of brutal inhumanity. But the lessons we can derive, as the collection amply demonstrates, are nonetheless useful and important, especially now.

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[21] Gerald L. Neuman, *On Fascist Honour and Human Dignity: A Sceptical Response*, in DARKER LEGACIES OF LAW IN EUROPE, 269 (CHRISTIAN JOERGES/NAVRAJ SINGH GALEIGH EDS., 2003).